DATO' KANAGALINGAM VELUPILLAI

v.

MAJLIS PEGUAM & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AZMEL MAAMOR J
[CIVIL APPEAL NO: R-17B-157-2002]
29 FEBRUARY 2004

ADMINISTRATIVE LAW: *Exercise of judicial functions - Domestic tribunal - Presence of disqualified persons at disciplinary board proceedings - Whether in breach of rules of natural justice*

EVIDENCE: *Presumptions - Section 114(g) - Refusal of disciplinary board to reveal names of persons at meeting - Whether presence of disqualified members at such meeting may be presumed*

LEGAL PROFESSION: *Professional discipline - Disciplinary proceedings - Refusal of Advocates & Solicitors Disciplinary Board to reveal names of members at meeting where decision to appoint Investigating Tribunal made - Whether presence of disqualified members at such meeting may be presumed - Whether presence of Bar Council President or his alternate at such meeting may be presumed - Evidence Act 1950, s. 114(g)*

LEGAL PROFESSION: *Professional discipline - Disciplinary proceedings - Complaint against advocate and solicitor lodged by Bar Council - President of Bar Council or his alternate presumed present at meeting where decision to appoint Investigating Tribunal made - Whether President's or alternate's presumed presence at such meeting in breach of principles of natural justice - Whether r. 4(1) Legal Profession (Disciplinary Board) (Procedure) Rules 1994 had been breached*

LEGAL PROFESSION: *Professional discipline - Disciplinary proceedings - Decision by Advocates & Solicitors Disciplinary Board to appoint Investigating Tribunal to investigate complaints against advocate & solicitor - Whether such decision appealable - Whether High Court seized with jurisdiction to hear such appeal*

WORDS & PHRASES: *'Any decision' - Section 103E(1) Legal Profession Act 1976*

The first respondent – the Bar Council, by letter dated 6 August 2002 lodged two complaints against the appellant – an advocate & solicitor, to the second respondent – the Advocates & Solicitors Disciplinary Board ('the board'). The letter of complaint was signed by the President of the Bar Council ('the President'). The board decided that there were merits in the complaints and sought to constitute an investigating tribunal ('the tribunal') to inquire into the complaints pursuant to s. 100(1) of the Legal Profession Act 1976 ('the Act'). The appellant upon notification of such intention, wrote to the board requesting for copies of the attendance sheet of members who attended the board's meeting which deliberated on the complaints as well as the full and complete minutes of such meeting. The appellant's request was rejected and the appellant appealed to the High Court against the board's decision pursuant to s. 103E of the Act. The appeal was basically in respect of the composition of the board that had determined there was merit in the complaints requiring investigation by the tribunal. Counsel for the Bar Council raised a preliminary point of law arguing that the High Court had no jurisdiction to entertain an appeal against a decision of the board to appoint a tribunal since such decision was not a final decision on the merits of a complaint.

Held (allowing the appeal with costs):

[1] Section 103E(1) of the Act refers to any decision or order of the board being appealable to the High Court. The decision of the board to constitute an investigating tribunal to investigate the said complaints against the appellant was a decision within the meaning of s. 103E(1) of the Act. As such the High Court had the jurisdiction to hear the appeal by the appellant against the decision of the board in accordance with the clear and unambiguous wordings of s. 103E(1) of the Act. (p 512 a-c)

[2] In the instant case the Bar Council was the complainant. As such the President or his alternate would be disqualified from being a member of the Disciplinary Board. It was thus essential to ensure that the President or his alternate was not a member of the board when it met to make a decision to constitute the tribunal to investigate the complaints against the appellant. In order to ensure that disqualified persons did not attend the meeting, it was almost essential for the board to respond positively to the appellant's request and reveal to the appellant the names of the members who attended the meeting. Because the board refused to reveal the names of the members who attended the meeting, s. 114(g) of the Evidence Act 1950 could be invoked, thereby raising the presumption that the President or his alternate was present at the meeting. (pp 512 h & 513 a-c)

[3] In view of the application of s. 114(g) of the Evidence Act 1950, in that the composition of the members of the Board was unlawful because of the presumed presence of disqualified person, the decision of the Board to constitute the Investigating Tribunal was *void ab initio*. The appeal of the appellant was thus timely and legally appropriate. (p 514 a-b)

[4] With the presumed presence of the President of the Bar Council at the said meeting, r. 4 of the Legal Profession (Disciplinary Board) (Procedure) Rules 1994 had been breached. The board had therefore failed to observe the basic rules of natural justice when it deliberated on the complaint of the Bar Council against the appellant. (p 514 d)

Case(s) referred to:
Duport Steels Ltd & Ors v. Sirs & Ors [1980] 1 WLR 142 ***(refd)***
Rohana Ariffin & Anor v. Universiti Sains Malaysia [1989] 1 MLJ 487 ***(refd)***
Stollery v. Greyhound Racing Control Board [1972] 128 CLR 509 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Interpretation Acts 1948 and 1967, s. 17
Legal Profession Act 1976, ss. 93(3), 100(1), 103E(1)
Legal Profession (Disciplinary Board) (Procedure) Rules 1994, r. 4(1)

For the appellant - V Sithambaram (KT Wong); M/s V Siva & Partners
For the 1st respondent - BP Vendargon (T Kunaseelan); M/s Gunaseelan & Assocs
For the 2nd respondent - Kevin Wong

Reported by AC Simon

JUDGMENT

Azmel Maamor J:
This is an appeal by the appellant under s. 103E of the Legal Profession Act 1976 (the said Act) against the whole of the decision of the 2nd defendant *vide* letter dated 21 November 2003. The 2nd respondent had made a decision that the two complaints made by the 1st respondent *vide* letter dated 6 August 2002 had merit and decided to constitute an Investigating Tribunal to inquire into the said complaints pursuant to s. 100(1) of the said Act.

The Background
By a letter dated 6 August 2002 the 1st respondent lodged a complaint with the 2nd respondent against the appellant. The letter states:

Bil Kami: BC/COMP/27/2002(db)

6 August 2002

Director
Disciplinary Board
8th & 9th Floor, Wisma Maran
28, Medan Pasar
50050 Kuala Lumpur

Dear Madam,

RE: COMPLAINTS AGAINST DATO' KANAGALINGAM S/O VELLUPILLAI OF M/S V.K. LINGAM & CO. BY THE BAR COUNCIL

Pursuant to Section 99(3) of the Legal Profession Act 1976 ("the said Act"), the Bar Council is making two complaints against the above mentioned solicitor ("the Respondent"). The brief facts are as follows:

1st Complaint:

1. On or about February 1998, the Bar Council received information that a photograph showing the Respondent on holiday with the Chief Justice, Tun Dato' Seri Haji Mohd Eusoff bin Chin, had been seen on the Internet. The Bar Council was able to verify this information by accessing the Internet and downloading a copy of the said photograph. A copy of the said photograph is annexed hereto and marked "BC-1".

2. On 27.8.98, the Bar Council sent a letter to the Respondent by hand requesting for the Respondent's comments with regard to the said photographs within fourteen days from the said date. As there was no response, the Bar Council issued two letters of reminder, delivered by hand, dated 29.9.98 and 7.10.98. There was no reply to any of the said letters. Copies of the said letters are annexed hereto and collectively marked "BC-2".

3. A final letter of reminder dated 16.11.98 was sent to the Respondent by hand specifically drawing the attention of the Respondent to Ruling 10(b), Part H of the Rulings of the Bar Council 1977 on "Courtesy" wherein it is stated:

> An advocate and solicitor must promptly reply to correspondence from fellow advocates and solicitors, the Bar Council, State Bar Committee, clients and former clients.

The Respondent also put on notice that a breach of the said Ruling could lead to disciplinary proceedings being taken against him but the Respondent failed to respond. A copy of the said letter dated 16.11.98 and an extract of Ruling 10(b) are annexed hereto and marked "BC-3" to "BC-4" respectively.

2nd Complaint:

4. In an article published by the Star newspaper dated 31.8.99, it was reported that Asian Wall Street Journal correspondent, Mr. Raphael Pura had alleged in his amended statement of defence that judgment by High Court Justice Mokhtar Sidin (as he then was) in the case of Tan Sri Vincent vs MGG Pillai and others was "written in part by the plaintiff's counsel Datuk V.K. Lingam" and initially typed by "Lingam's secretaries one Jayanthi and Sumanthi." It was further reported, that Pura claimed that the final draft was "despatched to the said learned judge on floppy disk". A copy of the said article is annexed hereto and marked "BC-5".

The Bar Council is of the view that the Respondent has breached Rule 31 of the Legal Profession (Practice and Etiquette) Rules 1978 and that the Respondent's actions amount to misconduct under Sections 94(3)(d), 94(3)(k) and 94(30(o) of the said Act.

I shall be obliged if you could please inquire into the above complaints pursuant to Section 100 of the said Act

Thank you.

Sgd:

Mah Weng Kwai
President

Encl.

cc/

That were no other complaints made against the appellant to the 2nd respondent by the 1st respondent or by anyone else. By a letter dated 28 October 2002 the appellant forwarded his brief explanation in respect of the said complaints made by the 1st respondent. However by a letter dated 21 November 2002 the 2nd respondent informed the appellant that the 2nd respondent had determined that there was merit in the said complaints and decided to constitute an, Investigating Tribunal to inquire into the said complaints pursuant to s. 100(1) of the said Act. That letter was served on the appellant on 25 November 2002.

Against this decision of the 2nd respondent the appellant lodged an appeal to this court on 23 December 2002.

The appellant had written two letters dated 27 November 2002 and 26 December 2002 to the 2nd respondent requesting, among other things:

(a) Attendance sheet of all members who attended the Disciplinary Board Meeting which deliberated upon the Bar Council Complaint.

(b) The full and complete minutes of the Disciplinary Board which decided to constitute the Investigating Tribunal to inquire into the said Complaint.

On 13 November 2003 the 2nd respondent replied rejecting the appellant's request. The relevant portion of the letter states:

> We are however unable to accede to your request under items (d), (e) and (f) as we are not at liberty to furnish the same.

The appellant's request under items (d) and (e) are as per para (a) and (b) of the above quoted letter.

In this appeal the appellant had given 15 grounds of appeal in his memorandum of appeal (See p. 1-7 of the Rekod Rayuan Vol. 1). Upon perusal of the memorandum of appeal we were of the view that for purposes of this appeal only Ground No. 4 was relevant. It states:

> 4. The decision of the 2nd Respondent was tainted and vitiated by gross bias as the office bearers/council members of the 1st Respondent who was the complainant sat and participated in the decision making process of the 2nd Respondent to constitute an Investigating Tribunal to inquire into the complaints.

Before proceeding any further, we wish to point out that there were two minor applications made by the parties. Firstly, the 2nd respondent applied to withdraw as a party to this action. There were no objections by the appellant and the 1st respondent. As such we allowed the 2nd respondent's application with no order as to costs. However for purposes of identification only we continued to use the term "2nd respondent" when referring to Lembaga Tatatertib Peguam-Peguam. Secondly, the appellant had applied to amend the name of the 1st respondent from "the Bar Council" to "the Malaysian Bar". Again there was no objection by any party to this application. As such we allowed it without any argument.

1st Respondent's Preliminary Objection

The counsel for the 1st respondent had raised a preliminary point of law and submitted that this court has no jurisdiction to entertain an appeal from a decision of the 2nd respondent to appoint an Investigation Tribunal to investigate and report, since such decision is not a final decision on the merits of a complaint.

In support of his argument the learned counsel contended that this court should adopt the purposive approach to statutory interpretation as has been entrenched by s. 17 of the Interpretation Acts 1948 and 1967.

The learned counsel for the 1st respondent further submitted that the said decision of the 2nd respondent was only a preliminary one and not a final decision on the merits of the said complaints. The said decision was only taking a step in investigating a complaint and therefore it was not a final decision affecting the personal and professional livelihood of the appellant.

In reply the counsel for the appellant submitted that on a plain and simple reading of s. 103E(1) of the said Act, it provides that any aggrieved party can appeal against any decision or order of the Disciplinary Board and hence the appellant being the aggrieved party "shall have the right to appeal to the High Court" against the decision of the 2nd respondent to initiate a formal investigation against him. In this particular case the 2nd respondent had made a decision.

The appellant's counsel further submitted that to restrict the appeal only after the Investigating Tribunal had completed its investigation and made its recommendation to the disciplinary board would tantamount to going against the letter and spirit of s. 103E(1) of the said Act.

The appellant's counsel urged the court to interpret the law in accordance to the clear words of the statute and not in accordance with the intended policy. The purposive approach should only be used if there was ambiguity in the wordings of the statute. The counsel referred to the House of Lords Case of *Duport Steels Ltd. & Others v. Sirs & Others* [1980] 1 WLR 142 where at p. 157 Lord Diplock held:

> ... Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to the plain meaning because they themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral ...

For ease of reference, the material paragraph of the 2nd respondent's letter of 21 November 2002 to the appellant is reproduced:

> Please be informed that pursuant to s. 100(1) of the Legal Profession Act, 1976 (as amended), the Disciplinary Board has determined that there is merit in the said complaint and decided to constitute an Investigating Tribunal to inquire into the complaint.

After having considered the arguments from both sides, we were more inclined to agree with the submission by the counsel for the appellant. If the wordings of the statute are clear and unambiguous then it would not be prudent for the court to look into the purpose for which the law is enacted. Section 103E(1) of the Act reads:

> Any party aggrieved by any decision or order made by a Disciplinary Board shall have the right to appeal to the High Court within one month of notification of the decision or order complained against.

This section talks about any decision or order of the disciplinary board which is appealable to the High Court. In our view the decision of the 2nd respondent to constitute an Investigating Tribunal to investigate the said complaints against the appellant was a decision within the meaning of s. 103E(1). As such this court would have the jurisdiction to hear the appeal by the appellant against the decision of the 2nd respondent in accordance with the clear and unambiguous wordings of s. 103E(1) of the said Act.

We wish to emphasise that our consideration of this appeal by the appellant was basically in respect of the composition of the disciplinary board that had determined there was merit in the complaint and decides to constitute an Investigating Tribunal to investigate the complaint against the appellant.

Under s. 93(3) of this said Act the composition of the disciplinary board shall consist of, among others, the followings:

> (a) ...
>
> (b) the President of the Bar Council with the Vice-President as his alternate;

Rule 4(1) of the Legal Profession (Disciplinary Board) (Procedure) Rules 1994 states:

> Where the Bar Council is the complainant or where the Bar Council intervenes under rule 8 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994, the President of the Bar Council or his alternate, as the case may be, shall be disqualified as member of the Disciplinary Board for the purpose of the quorum.

In this case it is common ground that the Bar Council was the complainant. As such the President of the Bar Council or his alternate would be a disqualified person to be a member of the Disciplinary Board. Such being the situation it would be very essential to ensure that the President of the Bar Council or his alternate was not a member of the Disciplinary Board when it made the decision to constitute the Investigating Tribunal to investigate the complaints against the appellant. Towards this end, the appellant had written

to disciplinary board (2nd respondent) requesting for the names of the members who attended the Disciplinary Board Meeting which deliberated the Bar Council complaint. But in its reply the 2nd respondent refused to accede to the appellant's request. In our view, in order to ensure that disqualified persons do not attend the meetings it was almost essential for the 2nd respondent to respond positively to the appellant's request and reveal the names of the members attending the said meeting. Because the 2nd respondent refused to reveal the names of the members who attended the said meeting, s. 114(g) of the Evidence Act 1950 can be invoked, thereby raising the presumption that the President of the Bar Council or his alternate was present at the said meeting. It is essential whenever the 2nd respondent make any decision or order the rules of natural justice must be adhered to and elements of biasness be removed. We need only to refer to the case of *Rohana bte Ariffin & Anor v. Universiti Sains Malaysia* [1989] 1 MLJ 487 where Edgar Joseph Jr. (as he then was) held:

> The proceedings before the disciplinary authority were contrary to natural justice owing to the presence of the registrar of the respondent university, the complaint of both applicants during the disciplinary authority's deliberation.

In his judgment His Lordship had referred the Australian case of *Stollery v. Greyhound Racing Control Board* [1972] 128 CLR 509, and quotes the decision of Menzies J as follows:

> A long line of authority establishes that the decision of a tribunal whose duty is to act judicially, will be invalidated if, while the tribunal deliberates and reaches a finding adverse to a person whose conduct is under scrutiny, there is present some person, who, in fairness, ought not to be there.

In the same Australian case Gibbs J made the following decision:

> It is, however, clear that it would not be in accordance with the principles of natural justice for a person who was in truth the accuser to be present as a member of a tribunal when the charge which he had promoted was heard, even if he took no actual part in the proceedings ... The very presence of a person who has brought forward a complaint may, even unconsciously, inhibit the discussions and affect the deliberations of the other members of the tribunal.

In this instant case, because the 2nd respondent refused to reveal the names of the members of board after having twice been requested by the appellant we had no doubts whatsoever that the presumption under s. 114(g) of the Evidence Act be applied. In the light of the circumstances we had to assume that the President of the Bar Council or his alternate was present at the decision making session.

In the light of the invocation of s. 114(g) of the Evidence Act in that the composition of the members of the 2nd respondent was unlawful because of the presence of an disqualified person it was our considered view that the decision of the 2nd respondent to constitute the Investigating Tribunal was *void ab initio*. To allow the 2nd respondent to continue to act further until the completion of the investigation by the Investigating Tribunal would be a sheer waste of time and serve no useful purpose. In such circumstances, we were of the opinion that the consideration of the appeal by the appellant was timely and legally appropriate.

It is therefore our finding that after being requested by the appellant, the 2nd respondent's refusal to reveal the names of the members attending the meeting that determined that the complaint against the appellant had merit and decided to constitute the Investigating Tribunal to investigate the 1st respondent's complaint against the appellant would clearly give rise to the presumption under s. 114(g) of the Evidence Act that the President of the Bar Council or his alternate was present at the said meeting. And with the presence of the President of the Bar Council the provision of r. 4 of the Legal Profession (Disciplinary Board) (Procedure) Rules 1994 had been breached. We therefore concluded that based on the authorities cited above the 2nd respondent had failed to observe the basic rules of natural justice when it deliberated on the complaint of the 1st respondent against the appellant. It was on this ground that we unanimously allowed the appeal by the appellant with costs.